All State Factors, Secured Party in Possession of North Park Meat Company *and* Amalgamated Meat Cutters & Butcher Workmen of North America, Local 229, AFL–CIO. Case 21–CA–10810

September 7, 1973

DECISION AND ORDER

BY MEMBERS JENKINS, KENNEDY, AND PENELLO

On March 30, 1973, Administrative Law Judge James T. Barker issued the attached Decision in this proceeding. Thereafter, Respondent and the General Counsel filed limited exceptions and supporting briefs.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings,[1] and conclusions of the Administrative Law Judge and to adopt his recommended Order, as herein modified.[2]

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that Respondent, All State Factors, Secured Party in Possession of North Park Meat Company, San Diego, California, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order.

[1] In his Decision the Administrative Law Judge states that the effective period of the contract between North Park and the Union was from October 1, 1972, until October 1, 1973 As the record shows, the effective date of the contract began on October 1, 1970. This inadvertance is hereby corrected

[2] We note and hereby correct the Administrative Law Judge's inadvertent use of the word "for" rather than the word "to" in the first sentence of the fourth paragraph of that section of his Decision entitled "The Remedy"

DECISION

STATEMENT OF THE CASE

JAMES T. BARKER, Administrative Law Judge: This matter was heard at San Diego, California, on December 19, 1972, pursuant to a complaint and notice of hearing issued on May 12, 1972, by the Acting Regional Director of the National Labor Relations Board for Region 21, and an amendment to the complaint issued by the Regional Director of Region 21 on November 7, 1972. The complaint, as amended, arose from a charge filed on March 27, 1972, by Amalgamated Meat Cutters & Butcher Workmen of North America, Local 229, AFL–CIO, hereinafter called the Union. The amended complaint alleges violations of Section 8(a)(1) and (5) of the National Labor Relations Act, as amended, hereinafter called the Act. On February 6, 1973, the parties timely filed briefs with me.

Upon the entire record in this case, and upon my observation of the witnesses and consideration of the briefs of the parties, I make the following:

FINDINGS OF FACT

I JURISDICTIONAL FACTS

North Park Meat Company, Inc., hereinafter called North Park, is a California corporation with a principal office at San Diego, California. Prior to June 24, 1971, North Park operated a wholesale and retail meat company in San Diego.

All State Factors, hereinafter called All State or Respondent, has been at all material times a commercial finance company engaged in the factoring of accounts receivable. In July 1970, a factor relationship between All State and North Park was established and representatives of the respective parties executed a financing statement filed pursuant to the California Uniform Commercial Code. The statement was duly filed with the Secretary of State of the State of California on July 3, 1970. By virtue of the transaction, All State received a security interest in the entire assets of North Park, including, *inter alia*, accounts receivable, inventories, materials, fixtures, and machinery presently or prospectively to be owned, held, acquired by, or payable to North Park, then owned and managed by John Delfino.

On June 24, 1971, pursuant to the aforesaid security interest which had remained intact, All State took possession of the assets of North Park to protect North Park's continued indebtedness to All State.

During the 12-month period commencing April 1970, North Park purchased from Swift & Co. beef valued in excess of $200,000 which had been shipped by Swift directly from Tolleson, Arizona, to North Park at its San Diego facility; and during the same period of time North Park purchased from Swift & Co. pork valued at approximately $150,000, which pork products were shipped from Sioux City, Iowa, to San Diego, California. Thereafter, from June 1971 until April 1972, Swift & Co. made sales to All State of pork valued at approximately $91,000, which pork products were shipped by Swift & Co. from its Sioux City, Iowa, establishment to the North Park plant location in San Diego, California.

During the period July 1970 to September 10, 1971, the North Park facility was operated as a retail and wholesale establishment. The wholesale phase of the operation accounted for more than 50 percent of the total volume of business of North Park.[1]

Upon the basis of the foregoing, I find that the operations of North Park and Respondent fall within the discretionary

[1] The foregoing is based upon a composite of the credited testimony of Leon Mansfield, Richard Claus, and documentary evidence of record

jurisdictional standards of the National Labor Relations Board, and that it furthers the purposes and policies of the Act to assert jurisdiction over Respondent herein. *Siemons Mailing Service*, 122 NLRB 81; *Standard Plumbing and Heating, Inc.*, 185 NLRB 444; *E. Paturzo, Bro. & Son, Inc.*, 114 NLRB 1161.

II THE LABOR ORGANIZATION INVOLVED

Amalgamated Meat Cutters & Butcher Workmen of North America, Local 229, AFL–CIO, is a labor organization within the meaning of Section 2(5) of the Act.

III THE ALLEGED UNFAIR LABOR PRACTICES

A. *The Issues*

The principal issues in this case are whether Respondent is a successor employer to North Park, whether Respondent may be found to have assumed the terms of the North Park collective-bargaining agreement with the Union to the extent warranting a finding that, viewed in light of the decision in *N.L.R.B.* v. *Burns International Security Service, Inc.*, 406 U.S. 272 (1972), Respondent is bound by the terms of the collective-bargaining agreement between North Park and the Union; and whether Respondent in violation of Section 8(a)(5) and (1) withdrew recognition from the Union, unilaterally changed to benefits and working conditions of unit employees, and refused to recognize and bargain collectively with the Union as the exclusive bargaining representative of Respondent's employees concerning the effects of the March 17, 1972, plant closure upon unit employees.

B. *Pertinent Facts*

1. Background facts

At all pertinent times prior to June 24, 1971, John Delfino owned and managed North Park. As found above and as discussed more fully below, until September 1971, North Park engaged in the wholesale and retail meat business at its San Diego location. In October 1970, John Delfino, on behalf of North Park, became signatory to a collective-bargaining agreement between the Union and the Jobbing Butchers of San Diego County. The agreement, entitled the Jobber's Agreement, by its terms, was to be effective from October 1, 1972, to October 1, 1973. The agreement covered, *inter alia*, job classifications in the wholesale phase of North Park's operation in which employees of North Park were at pertinent times employed. In accordance with the union-security provisions of the Jobber's Agreement, the North Park personnel employed in the wholesale operation were represented by the Union. The agreement provided for referrals through the Union's hiring hall. It also contained a schedule of wages, augmented by a cost-of-living clause, and vacation, health and welfare, and pension benefit provisions.

Article XIV of the agreement, entitled "Change of Ownership," provides[2] in pertinent part as follows:

> (a) In the event of a change of ownership of the operation, whether it be voluntary, involuntary, or by operation of law, the Employer shall immediately pay off all obligations, including accumulated wages, prorata of earned vacations, sick and accident benefits, accumulated prior to the date of the change of ownership.
>
> (b) If any owner or Employer hereunder sells, leases, or transfers his business, or any part thereof, whether voluntary, involuntary, or by operation of law, it shall be his obligation to advise the successor, lessee or transferee of the existence of this Agreement and such successor, lessee or transferee shall be bound fully by the terms of this Agreement in effect at the time of the sale, lease or transfer; and in the event the seller or transferrer fails to pay his obligations hereunder, shall assume all obligations of this Agreement in the place and stead of the Employer signatory thereto the same as if he had been the owner or Employer from the beginning.

As delineated above, on June 24, 1971, Respondent took possession of the assets of North Park pursuant to the rights, obligations, limitations, and procedures governed and controlled by the California Commercial Code which, at section 9504 thereof, provides, *inter alia*:

> (1) A secured party after default may sell, lease, or otherwise dispose of any or all of the collateral in its then condition or following any commercially reasonable preparation or processing . . .
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> * * * * *
>
> (2) If the security interest secures an indebtedness, the secured party must account to the debtor for any surplus, and, unless otherwise agreed, the debtor is liable for any deficiency. But if the underlying transaction was a sale of accounts, contract rights, or chattel paper, the debtor is entitled to any surplus or is liable for any deficiency only if the security agreement so provides.
>
> (3) A sale or release of collateral may be made by a unit or in parcels, at wholesale or retail and at any time and place and on any terms, provided that the secured party acts in good faith and in a commercially reasonable manner.

Section 1201.37 of the Uniform Commercial Code provides:

> A security interest means an interest in personal property or fixtures which secures payment or performance of an obligation . . . the term also includes any interest of a buyer of accounts, chattel paper or contract rights. . . .

[2] On October 30, 1970, John Delfino had executed an interim agreement which incorporated the terms of a retail distribution agreement about to expire In substance this agreement with the Union covered terms and conditions of employment of employees working in the retail phase of North Park's operations The retail distribution agreement contained a change of ownership clause substantively the equivalent of that contained in the Jobber's Agreement The General Counsel does not contend that All State, the Respondent herein, violated any provisions of the retail agreement

Upon taking possession of the North Park facility, Respondent posted the following notice on the North Park premises:

> Notice of possession to all interested parties: These premises and all the assets of North Park Meat Company, Incorporated, and John Delfino, are now in the possession of All State Factors pursuant to the obligations owed to All State Factors by North Park Meat Company, Incorporated, and John Delfino and that security interest is given to secure their obligations. Authority for this notice refer to UCC—1, file S69079-500 and 70063262. For further information, contact All State Factors, 935C Street, San Diego, Richard Claus at 233–7681.

At all pertinent times after June 24, the notice remained posted.

At a time proximate to the posting of the notice, Archie Jacobs, president of Respondent, spoke with some employees at the North Park premises and informed them that Delfino "was in financial trouble" and All State was "trying to help him out."

2. The alleged unlawful conduct

a. *The "successorship" facts*

When it took possession of the facility, Respondent commenced the payment of wages to employees and made appropriate tax and unemployment insurance deductions. The checks covering wages were drawn upon the All State account and the remittances made to the government for tax and insurance deductions were made under the All State tax number.[3]

Respondent took possession of North Park on June 24 with no intention to operate North Park as an entity under its own control and management. No consideration in the form of a fixed or stipulated sum of money passed between All State and North Park. Possession was taken in order to protect Respondent's interest in the funds which it had advanced to North Park on accounts receivable. It was determined that the funds so advanced exceeded by more than $50,000 the value of North Park's physical assets and accounts receivable. After it assumed possession of North Park, Respondent undertook immediate and continuing efforts to obtain a purchaser of the North Park operation upon the assumption that the enterprise was more valuable as a going concern than as a liquidated one. Respondent was unsuccessful in obtaining a buyer for the properties and business.[4]

After Respondent assumed possession, John Delfino remained as manager and as the supervisor of the operation. All State continued to operate under its own business licenses. Frank Cappallo, a representative of Respondent, consulted and advised Delfino on a continuing and recurring basis throughout the pertinent times subsequent to June 24. Archie Jacobs, president of All State, and Richard Claus, secretary-treasurer of All State, maintained continuing scrutiny of the North Park operations. After June 24, the operations continued from the same location under the same trade name and with the same equipment as had been used by North Park prior to June 24. No modifications were made in the job categories employed or utilized in the operations and the number of personnel remained approximately the same.[5] The duties and the compensation of the employee complement remained the same as before June 24, and employees continued to have use of the employee room at the North Park facility and to receive coffeebreaks.[6]

b. *The Union and Respondent consult*

Arthur Meyer, administrative assistant and recording secretary of the Union, suffered a heart attack in May and returned to work in July. By virtue of documents received from San Diego Wholesale Credit Men's Association dated July 2, 1971, Meyer first learned that Respondent had become "involved" in the operation of North Park.[7] As a consequence, Meyer initiated a telephone call to Claus and inquired if All State was operating North Park. Claus answered in the affirmative and Meyer attempted to arrange a meeting for the purpose of discussing All State's obligations under the collective-bargaining agreement between the Union and North Park. In this connection, Meyer informed Claus that the agreement rendered All State responsible as a successor under the contract. Claus was noncommittal and stated that Jacobs, who was out of the city at the time of the telephone conversation, would have to make a determination with respect to that matter. A meeting was arranged for the following week.

Meyer met with Jacobs and Claus as scheduled. During the course of the meeting, Meyer pointed out the successorship clause in the Union's collective-bargaining agreement with North Park, and asserted that Respondent was responsible for fulfilling the terms of the agreement, including the obligation to pay the wages and the employee benefits. Meyer also asserted that Respondent was responsible for the payment of back wages and other obligations which had accrued with respect to employee benefits under the collective-bargaining agreement. In this latter regard, Meyer noted that certain contributions to the health and welfare fund were due and owing and that Conrad Palladino, an employee, was due vacation benefits for which he had not been compensated. Additionally, as the meeting progressed, Meyer attempted to delineate the identity and duties of the personnel employed in the operation. Respondent took the position that it was responsible for wages and contributions only from July 1, and thereafter. No understandings were

[3] The foregoing is based upon the credited testimony of Richard Claus and Leon Mansfield

[4] The foregoing is based upon the credited testimony of Richard Claus

[5] There appears to have been some turnover in personnel but the small complement employed by North Park prior to June 24, continued to be employed at the North Park facility for a substantial period of time after the June 24 date A large percentage of the original complement continued to be employed until operations ceased

[6] The foregoing is based upon a consideration of the testimony of Richard Claus, Leon Mansfield, Paul Blair, and Clifford Glass

[7] The documents in question purport to delineate the details of the creditor relationship between All State and North Park In the meantime, Ann Long, office manager of the firm serving as the administrator of the Union's pension and benefit funds, received a copy of the same notice

reached during the course of the meeting and the parties agreed to meet at a subsequent time.

Approximately 2 weeks later, Meyer met with Jacobs and Claus. This meeting, like the earlier one, dealt with the asserted successorship responsibilities of All State and its alleged obligation to satisfy delinquencies in payments to the health and welfare and pension trust funds. Additionally, during the course of the meeting, Meyer established that all of the nonclerical employees then working in the operation were union members.

c. *Prevailing terms of employment*

At the time of the second meeting, Respondent was adhering to the wage scale contained in the collective-bargaining agreement between the Union and North Park and was timely making *current* contributions to the health and welfare and pension trust funds. Assurances were given Meyer that Respondent would continue to do so prospectively. However, during the course of the second meeting, no commitment was made by either Jacobs or Claus to make payments into the described funds covering accruals prior to July 1, 1971. Meyer did not request Respondent to sign a collective-bargaining agreement and no commitment to do so was made.[8]

On September 9, 1971, pursuant to the Union's request, Respondent compensated Palladino for vacation benefits which had accrued to him under the collective-bargaining agreement prior to the time Respondent took possession of the North Park facility.

In mid-September, 1971, Respondent notified the Union that its retail operation was being discontinued and that the personnel employed in the retail phase of the operation would be transferred to the wholesale division with no loss of employment. Thereafter, by letter dated September 10, the administrator was advised by the Union of the discontinuation of the retail operations of North Park and the transfer of five designated employees to the "jobbing department." Subsequently, the administrator billed Respondent for contributions due the trust funds under the terms of the Jobber's Agreement by virtue of the employment of the five transferred employees. Thereafter, by check dated January 7, 1972, Respondent remitted appropriate payments to both trust funds.[9] The checks covering the remittance bore an imprint describing All State as "Secured Party in Possession of North Park Meat Company, Inc."

In the meantime, wage increases which were to become effective on October 15, 1971, as well as increased contributions to the health and welfare and pension funds which were to take place during 1971, had been subjected to the wage and price freeze which was instituted by the Federal government under the Economic Stabilization Act of 1970. In due course, these increases were given clearance by the Government and pursuant to notice the employees received the retroactive wage increment due them under the collective-bargaining agreement. Wages were prospectively paid at the higher contractual rate. Similarly, on February 2, 1972, Respondent remitted appropriate retroactive payments to the pension trust fund.

The last billing made by the administrator of the trust funds was one covering the period December 1, 1971, to February 29, 1972. Respondent made no remittance to the administrator pursuant to the billing and no further remittances to the trust funds were thereafter made.[10]

In the interim, Meyer had maintained a weekly contact with Respondent in an effort to police its adherence to wage scales and benefit provisions. He made continuing demands for full observance of wage and benefit standards and during the period of time in question undertook discussions with Respondent relating to vacation pay allegedly due a former employee, Hicks, whom the Respondent had terminated. Meyer further discussed with Respondent matters relating to the classification and wage scale paid employee Blair.[11] Moreover, during the early part of 1972, Meyer discussed with Respondent's representatives the possible layoff of certain of the employees in order to effectuate needed efficiencies and economies. Meyer objected to the proposed course of action. Respondent did not follow through with its plan.

In the meantime, Clifford Glass, a member of the Union, was employed at the North Park facility through the auspices of the Union.[12]

d. *The operations cease*

On March 15, 1972, Frank Cappallo, Respondent's representative at the North Park premises, spoke to employees and informed them that the premises would be shut down for a period of time. He informed Glass that he would be laid off while the plant was closed down for a week to permit the premises to be remodeled. Thereafter the same afternoon, employees Palladino and Glass informed Meyer of the scheduled shutdown. Meyer had received conflicting rumors concerning the nature of the shutdown and was uncertain whether the plant was to be closed permanently or for a few days only. He consulted with counsel for the Union who on March 15 dispatched the following letter to Respondent:

> Please be advised that this office represents Butchers Local Union 229, the exclusive collective-bargaining representative of your employees.
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> At approximately 3:00 p.m. on March 15, 1972, it came to the attention of Butchers Local 229 that you intend to close your shop at 5:00 p.m. on Friday, March 17, 1972, and lay off all employees currently represented by Butchers Local 229.
>
> On behalf of Butchers Local 229, this office hereby demands collective bargaining negotiations between yourselves and Butchers Local 229 with regard to your

[8] The foregoing is based upon the testimony of Arthur Meyer considered in light of the testimony of Richard Claus and Ann Long and documentary evidence of record I do not credit Meyer's testimony to the extent it may infer that Respondent agreed to follow *all* the terms of the existing agreement

[9] The parties through consultation made adjustments deemed appropriate in the billing as originally rendered and the agreed-upon amount was submitted by check of January 7

[10] The foregoing is based upon the credited testimony of Ann Long and documentary evidence of record

[11] Respondent disclaimed obligations with respect to each of the aforesaid employees and the issues remained unresolved

[12] The foregoing is based upon the credited testimony of Arthur Meyer.

unilateral decision to close the shop and lay off existing employees. On behalf of Local 229, we further demand collective bargaining negotiations about the effect of this decision upon your employees.

These demands are made upon you as a result of your obligation to bargain in good faith with Butchers Local 229 since you are, in fact, a successor Employer to North Park Meat Company.

In order that negotiations may be completed prior to the closing of your plant on Friday, March 17, it is urgent that you communicate with this office on or before 12:00 noon, March 16, 1972, to arrange negotiations.

If you have any questions in this regard, please feel free to communicate with the undersigned.

The following day, March 16, Meyer went to the premises of North Park and spoke with Cappallo and Claus. Meyer was informed that the plant was going to be closed for a few days for refurbishment and would reopen. Meyer referred to the Union's letter of the previous day demanding negotiations. He was informed by Cappallo and Claus that there was nothing to negotiate "at the present time."

Respondent did not comply with the Union's demand as contained in the letter of March 15. On March 17 the premises were closed and did not thereafter reopen.

On March 21, 1972, counsel for Respondent wrote in pertinent part as follows:

> Be advised that with reference to your letter of March 15, 1972, All State Factors rejects the demands as set forth in said letter and further rejects that they are under any obligation to even recognize any right in Butchers' local Union 229. All State, therefore, further rejects the allegation in your correspondence indicating that Butchers' Local Union 229 is the exclusive bargaining representative of any employee of All State and further rejects demand to conduct negotiations and further rejects any demand based upon any alleged allegation to bargain in finality, rejects any allegation that All State is the successor-employer of North Park Meat Company, or to any other company.

Conclusions

The General Counsel contends that Respondent is a successor employer to North Park and therefore had the obligation under Section 8(a)(5) of the Act to recognize and bargain with the Union as the majority representative of the employees in the established bargaining unit which continued to be appropriate after Respondent became North Park's successor. Included also in the obligation imposed upon Respondent by the Act, contends the General Counsel, was the duty to bargain in good faith with the Union before effectuating changes in the existing employee benefits and to have bargained with the Union concerning the effects upon unit employees of closing down the operation of the San Diego facility. Further, the General Counsel asserts that, in the factual circumstances of this case, Respondent must be found to have adopted the collective-bargaining agreement of its predecessor, North Park, and that under an appropriate application of the decision in *N.L.R.B.* v. *Burns International Security Services, Inc., supra,* must therefore be found to have become bound by the terms of the agreement.

On the other hand, Respondent denies that it was the successor to North Park, and, in substance, contends that as a factor it was not an employer in the normal sense but essentially a foreclosing creditor with the legal obligation to liquidate the North Park property in a commercially reasonable manner. Alternatively, Respondent contends that, if it is found to have been a successor, no obligation to bargain collectively with the Union arose because no demand for bargaining was made upon Respondent by the Union until the North Park operation had been virtually liquidated in accordance with the obligations devolving upon Respondent under controlling state statutes.

At the outset, I conclude and find that, whatever the identity of the employer of the employees comprising the work complement at the North Park facility, the Union at all material times remained the majority representative. This status is presumed from the existence of the collective-bargaining agreement, lawful on its face, to which the Union, together with North Park, was a signatory.[13] No evidence was offered to cast doubt upon the majority status of the Union after Respondent emerged as a viable force in the North Park operation. Additionally, there is independent record support for a finding that the composition of the unit remained virtually unchanged after Respondent entered the picture and that at pertinent times was comprised of members of the Union.[14]

Proceeding from this background premise, I find that upon application of normal successorship criteria Respondent would be found to have been a successor employer to North Park.[15] I reach this conclusion because the record evidence establishes that following June 24, 1971, when Respondent took possession of North Park, the trade name, location, nature, employee complement, hours of work, basic working conditions, equipment, and facilities of the enterprise remained virtually unchanged.[16] Although the retail phase of the operation was discontinued some 3 months after Respondent entered upon the scene in an active capacity, the operation continued, as before, to be one engaged in the sale of meat products.[17]

It remains necessary, however, to resolve the merits of Respondent's contention that the nature of its factor relationship to North Park relieved it from any collective-bargaining obligation which the Act would normally impose upon an employer. I find that this case is controlled by the decision of the Board in *Martin White, Jr., Inc.*, 165 NLRB 520. In the cited case, an executor held a mandate under the will of the deceased president and sole stockholder of a

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[13] *Barrington Plaza*, 185 NLRB 962, enfd in pertinent part *sub nom N.L.R.B.* v. *Tragniew*, 470 F.2d 669 (C.A. 9, 1972).

[14] The appropriate unit, of course, was "all employees of the employer" at the San Diego, California, facility

[15] See *Maintenance, Incorporated*, 148 NLRB 1299, 1301, *Bachrodt Chevrolet Co*, 186 NLRB 1035.

[16] John Delfino continued to function in the capacity of principal supervisor, although his former unfettered freedom to make managerial judgments was, to a degree, limited by the participation of representatives of Respondent in the day-to-day affairs of the enterprise.

[17] Cf *Atlantic Technical Services Corporation*, 202 NLRB No. 13.

corporate entity to sell the capital stock of the deceased and to liquidate the assets of the corporation within one year from the deceased's death. In substance, the Board held that as the legal operator of the corporation the executor had the obligation to recognize and bargain with the certified incumbent union as the representative of the corporation's employees. Cogently applicable here was the Board's rejection of the executor's contention that because of his special status *vis-a-vis* the corporation, and because of the imminence of dissolution of the corporation, the bargaining obligation normally assessible against a successor under the Act should not be imposed. In rejecting this contention it was stated in the *Martin White* decision, at page 525 thereof:

> Thus, so long as [the Respondent] was maintaining its corporate existence and the business enterprise, as was the case here, the Union continued to be the representative of its employees, and the operator of the enterprise had the obligation to recognize and bargain with the Union as such representative. And, if dissolution were to occur so that the employing entity would continue substantially unchanged, the purchaser would also be considered a successor and would have the same bargaining obligation as its predecessor. . . .

I discern no significant basis for distinguishing the plight of the Respondent herein from that of the executor in *Martin White*. Here, as in *Martin White*, the enterprise affected by the changed circumstances continued to operate in a viable fashion; on a parity with the executor in the cited case, Respondent herein, through its president and designated agents, maintained efficacious scrutiny and oversight of the North Park business operation; and the interests and rights of the unit employees in a continuity of representation rights was no less than in *Martin White*.[18]

Upon the foregoing considerations, I find that the principles underlying the decision in *Martin White* require rejection of Respondent's contention that the normal successorship obligations under the Act should not be imposed upon it.[19] Specifically, I find Respondent was the successor to North Park with the bargaining obligations which normally attend that status.

In delineating the extent and basis of this bargaining obligation, it is essential first to find, however, that, contrary to the General Counsel, Respondent may not be deemed under the rationale of the *Burns* decision to have adopted the terms of the North Park collective-bargaining agreement. The evidence establishes that, despite the Union's demands, Respondent pointedly refused to adopt the agreement, *in toto*, and no written instrument binding Respondent to the contracts' terms was ever executed.[20] Upon an analysis of the record evidence, viewed in light of the thrust of the opinion of the Court in *Burns*, which, as I comprehend it, counsels utmost restraint in applying an adoption theory, absent clear and convincing evidence of consent, either actual or constructive, I am convinced, and find, that both parties, the Union as well as the Respondent, through separate but realistic appraisals of the balance of economic strength, reached a tacit understanding of the terms and conditions of employment by which the San Diego facility could and would be manned and operated under Respondent's direction. Thus, I find that Respondent adopted as its own the contractual wage scale that had theretofore been in effect, and agreed, prospectively, to contribute at contractual rates to the health or welfare and pension funds. These became terms and conditions in practical and actual terms, through the good offices and active role of the Union as a viable voice and force acting on behalf of the employees as a group. For its part, Respondent applied so much of the North Park contract as was beneficial to it, refusing at the same time to apply other of its terms and [21] thus achieved stability in manpower, and continuity in operations, during a critical transitional phase. For its part, the Union, on behalf of the employees, achieved continued employment, at contractual wage levels, continued insurance and pension coverage and time in which to search the labor market for better job prospects.[22] Perhaps the employees hoped also for continuity of employment should the plant be purchased by an employer disposed to employ them. But all concerned knew that Respondent's time on the scene was to be limited and a sale, or liquidation of some variety, was very much in the offing. While the Respondent, by its conduct, gave tacit, if not explicit, recognition to the Union, and negotiated with it on a variety of problems related to the transition, upon the record as a whole, I am unable to conclude that Respondent may be found to have observed the North Park agreement to an extent and in a manner sufficient to have become bound in a constructively consensual way to the terms of the agreement.

I find nevertheless that under Section 8(d) and Section 8(a)(5) of the Act certain bargaining duties did devolve upon Respondent by reason of the relationship of the Respondent and the Union to the enterprise. Minimally, these duties included the obligation to recognize the Union as the majority representative of the unit of employees which remained intact after Respondent became the successor of North Park.[23] Additionally, this obligation rendered it necessary for Respondent pursuant to a valid demand of the nature here made by the Union on March 15 to have bargained in good faith with the union concerning the effects of the closing of the North Park facility upon unit employees.[24] Nothing in the duty imposed upon Respondent by state law to liquidate the business property in a commercial-

[18] It is revealed in the record, as found, that Respondent sought diligently to dispose of the North Park business as a going concern and thus anticipated a continuity of operations also, albeit through a new and different owner.

[19] See also *Paul Stevens, Receiver of Carolina Scenic Stages, et al.*, 109 NLRB 86, 97–98 The General Counsel herein is proceeding upon a successorship theory and does not contend that Respondent became the *alter ego* of North Park Accordingly, *Stateside Shipyard and Marina, Inc.*, 178 NLRB 516, cited by the Charging Party is not controlling herein

[20] Respondent's defense of the Statute of Frauds is inapposite to the facts of this case

[21] Some vacation benefits were paid Other claims were rejected. I am unable to conclude that Respondent agreed to include contractual vacation benefits as a term and condition of employment

[22] It is noteworthy that in contending that Respondent was bound to all of the contract's terms, the Union did not treaten economic action to support its demands.

[23] See *N L R.B* v *Burns International Security Services, Inc., supra* This obligation had its genesis in the Union's continued and unchallenged majority status in an appropriate unit employing personnel engaged in the functions attendant to the operation of the wholesale aspects of the North Park enterprise The absence of Board certification is not grounds for distinguishing *Burns*. See *Barrington Plaza, supra*

[24] *Transmarine Navigation*, 170 NLRB 389.

ly reasonable manner precluded Respondent from pursuing that course; nothing explains the misleading statements made to employees concerning the purpose and intended duration of the shutdown. The issuance of advance notice was clearly in order. None was given.

I conclude and find that by ignoring the Union's March 15 bargaining demand, Respondent, in legal and practical terms, deprived the Union of its statutory right to recognition and to negotiate in good faith on the bargainable issue of the effects of plant closure upon unit employees.

Respondent also failed its bargaining duty by effecting unilateral changes in benefits which, I find, had become accepted terms and conditions of employment for the employees which Respondent had chosen to utilize for continuing the operation of the enterprise.[25] Thus, as found, the record reveals that not only did Respondent apply the wage scale provided by the collective-bargaining agreement, but, pursuant to union demand and after consultation it, made contributions at the contractual rate to the health and welfare and pension trust funds and continued those contributions on a current basis through November 1972. Having made remittances to the funds at the behest of the bargaining representative of benefitted unit employees, and being fully aware that the Union was pressing for the maintenance of a parity of benefits, it became incumbent upon Respondent to treat with the Union before reaching a unilateral decision to discontinue the contributions to the trust funds. No *specific* prior bargaining demand was necessary for the right to be consulted was inherent in the nature of the relationship which had featured both tacit and overt averrals by the Union of recognition rights, recurring consultation concerning adherence to employment terms, adjustment of benefits claims pursuant to union demand and use of the hiring auspices of the Union.[26]

Upon the basis of the foregoing findings of fact, and upon the entire record in this case, I make the following:

Conclusions of Law

1. All State Factors, Secured Party in Possession of North Park Meat Company, and North Park Meat Company have been at times pertinent herein employers within the meaning of Section 2(2) of the Act.

2. All State Factors, Secured Party in Possession of North Park Meat Company is the successor employer to North Park Meat Company within the meaning of Section 2(2) of the Act and is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

3. Amalgamated Meat Cutters & Butcher Workmen of North America, Local 299, AFL–CIO, is a labor organization within the meaning of Section 2(5) of the Act.

4. All employees employed at the San Diego, California, facility of Respondent constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

5. At all times since June 24, 1971, the Union has been the majority collective bargaining representative of the employees in the above-described appropriate collective-bargaining unit.

6. On or about October 1, 1970, North Park entered into a collective-bargaining agreement with the Union whereby North Park agreed to recognize the Union as the collective-bargaining representative of all employees employed by it, and, *inter alia*, agreed to pay certain wage rates and further agreed to make contribution to the San Diego and Imperial Counties Butchers' and Food Employers' Pension and Health and Welfare Trust Funds pursuant to specified formulae.

7. On and after June 24, 1971, Respondent, by its conduct, including acquiescence in the Union's demands, adopted prevailing contractual wage rates as its own and agreed to make, and did make submissions of contributions to the health and welfare and pension trust funds described above, according to the formulae and the aforesaid contract.

8. On or about January 7, 1972, Respondent unilaterally discontinued making contributions to the health and welfare and pension trust funds, this in contravention of the terms which through practice and usage it had established as terms and conditions of employment of its employees.

9. On or about March 15, 1972, Respondent failed and refused to comply with the Union's request that it bargain in good faith with the Union as the collective-bargaining representative of Respondent's employees, concerning the effeect of the Respondent's decision to close its business and lay off unit employees.

10. On March 17, 1972, Respondent, without engaging in collective bargaining with the Union closed its San Diego, California, facility and laid off all employees in the collective-bargaining unit represented by the Union.

11. By failing and refusing since January 7, 1972, to make contributions to the health and welfare pension trust funds covering unit employees; by failing to honor the March 15, 1972, request of the Union to engage in collective bargaining with it concerning the effects of its planned March 17, 1972, closure of the plant and layoff of unit personnel; by effectuating the plant closure and layoff of unit employees represented by the unit without engaging in collective bargaining with the Union; and by effectively withdrawing recognition from the Union, the Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act.

12. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

The Remedy

Having found that Respondent has engaged in unfair labor practices in violation of Section 8(a)(5) and (1) of the Act, I shall recommend that it cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act.

Having found that Respondent failed and refused to comply with the Union's March 15, 1972, demand to bar-

[25] Respondent appears to have made no effort to reconstitute or revitalize the complement of employees and acquiesced in the retention of the complement virtually unchanged

[26] See *N L R B* v *Katz*, 369 U S 736 (1962), *Smith Cabinet Manufacturing Companies, Inc*, 147 NLRB 1506 See also *Howard Johnson Company*, 198 NLRB No 98, *Good Foods Manufacturing*, 200 NLRB No 86

gain concerning the effect upon unit employees of closing the San Diego facility, and the consequent layoff of unit employees, I shall order that Respondent cease and desist from refusing to recognize and bargain collectively with the Union as the exclusive collective-bargaining representatives of employees in the unit hereinabove found appropriate, with respect to the economic effects upon unit employees of the above-described actions, and, upon request, bargain collectively with the Union with respect to the economic effects of the plant closure and consequent layoff of unit employees, and if any understanding is reached, embody such understanding in a signed agreement.

I shall further order Respondent to make whole all employees who were laid off by virtue of the unilateral decision of Respondent to close the plant on March 17, 1972, by payment to said employees at their normal rates of pay in effeect on March 15, from 5 days after the date of this Decision until the occurrence of the earliest of the following conditions:

(1) The date Respondent bargains for agreement with the Union on those subjects pertaining to the effects on unit employees of the closing of the San Diego, California premises; (2) a bona fide impasse in bargaining; (3) the failure of the Union to request bargaining within 5 days of this Decision, or to commence negotiations within 5 days of the Respondent's notice of its desire to bargain with the Union; or (4) the subsequent failure of the Union to bargain in good faith. In no event shall the amounts to be paid the employees be less than the amounts the employees would have earned as wages during a 2-week period of employment; nor shall the sum paid to any of the employees exceed the amount he would have earned as wages from March 17, 1972, to the date he secured equivalent employment elsewhere. See *Royal Plating and Polishing Co., Inc.*, 160 NLRB 990, and *Transmarine Navigation*, 170 NLRB 389. Said sums shall be computed in accordance with the formula set forth in *F. W. Woolworth Company*, 90 NLRB 289, together with interest at the rate of 6 percent per annum as provided in *Isis Plumbing & Heating Co.*, 138 NLRB 716.[27]

I shall further order Respondent to make all contributions due and owing to the administrator of the San Diego and Imperial Counties Butchers' and Food Employers' Pension and Health and Welfare Trust Funds as would be required by full observance of the formulae it adopted as a term of employment and which was given application by Respondent in making remittances to the administrator of the trust funds, the amount of the remittances here required to be ascertained in light of individual employee backpay entitlement as determined through an application of the make whole provisions above set forth.

[27] I have considered the fact that the employees were at all times aware that Respondent was a creditor in possession of the business, and I presume knowledge on the part of the employees of Respondent's intentions to sell the business as a going enterprise Thus, the employees may well have assumed a known risk in continuing their employment in the face of the potentialities implicit in the aforesaid circumstance However, considering the fact that Respondent appears intentionally to have mislead the employees concerning the purposes of the closure and considering further the absence of any prior declaration of an impending, imminent shutdown of the operations, I shall not depart from the remedy applied by the Board in *Transmarine* and *Royal Plating*, cited above

Upon the foregoing findings of fact, conclusion of law, and the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

ORDER [28]

Respondent, All States Factors, Secured Party in Possession of North Park Meat Company, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain, upon request, with Amalgamated Meat Cutters & Butcher Workmen of North America, Local 229, AFL–CIO, as the representative of all of its employees at its San Diego, California facility.

(b) Effecting changes in preexisting employment benefits and terms and conditions of employment without consulting the statutory representative of its employees.

(c) Withdrawing recognition from, or failing and refusing to recognize, Amalgamated Meat Cutters & Butcher Workmen of North America, Local 229, AFL–CIO, as the statutory representative of its employees.

(d) In any like or related manner, interfering with, restraining, or coercing its employees in the exercise of their rights to self-organization, to form, join or assist the above-named union or any other labor organization, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, or to refrain from any or all such activities.

2. Take the following affirmative action which is deemed necessary to effectuate the policies of the Act:

(a) Upon request, bargain with the above-named Union as the exclusive representative of the employees in the unit defined above with respect to the effect upon unit employees of the decision to close the San Diego, California, facility, and reduce to writing any agreement reached as a result of such bargaining.

(b) In the manner and to the extent set forth in the section of this decision entitled "The Remedy" make whole the employees of the San Diego, California, facility for any loss of earnings they may have suffered as a result of the closing of the San Diego, California, facility.

(c) In the manner and to the extent provided in the section of this decision entitled "The Remedy" make all required contributions into the San Diego and Imperial County Butchers' and Food Employers' Pension, Health and Welfare Trust Funds.

(d) Preserve and, upon request, make available to the National Labor Relations Board or its agent, for examination and copying, all payroll records, social security payments and records, timecards, personnel records and reports and all other records necessary or useful in checking compliance is Ordered.

(e) Mail an exact copy of the notice attached hereto and

[28] In the event no exceptions are filed as provided by Section 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Section 102 48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and order, and all objections thereto shall be deemed waived for all purposes

marked "Appendix" [29] to Amalgamated Meat Cutters & Butcher Workmen of North America, Local 229, AFL–CIO, and to all individuals who on March 15, 1972, were employees under the Act at their San Diego, California, facility. Copies of said notice, to be furnished by the Regional Director for Region 21, after being duly signed by its authorized representative, shall be mailed immediately upon receipt thereof as herein directed.

(f) Notify the Regional Director of the National Labor Relations Board, in writing, within 20 days from the date of the receipt of this order, what steps the Respondent has taken to comply herewith.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

WE WILL, upon request, bargain collectively with Amalgamated Meat Cutters & Butcher Workmen of North America, Local 229, AFL–CIO, as the majority representative of all of our employees at our San Diego, California, facility, now closed, concerning the effect upon those employees of our closing of the facility, and reduce to writing to any agreement reached as a result of such bargaining.

WE WILL pay those employees who were employed on March 15, 1972, at the San Diego, California, facility, their normal wages for a period required by a decision of an Administrative Law Judge of the National Labor Relations Board.

WE WILL make all contributions due and owing to the administrator of the San Diego and Imperial County Butchers' and Food Employers' Pension and Health and Welfare Trust Funds as required by a Decision of an Administrative Law Judge of the National Labor Relations Board.

ALL STATE FACTORS, SECURED PARTY IN POSSESSION OF NORTH PARK MEAT COMPANY
(Employer)

Dated By
(Representative) (Title)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, Eastern Columbia Building, 849 South Broadway, Los Angeles, California 90014, Telephone 213–688–5229.

[29] In the event that the Board's Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall be changed to read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."